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## **Advisory Opinion 08-028**

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2007). It is based on the facts and information available to the Commissioner as described below.

### **Facts and Procedural History:**

On August 14, 2008, the Information Policy Analysis Division (IPAD) received an email from Bruce Fronning. In his email, Mr. Fronning asked the Commissioner to issue an advisory opinion regarding his access to certain data from School District 846, Breckenridge.

IPAD, on behalf of the Commissioner, wrote to Warren Schmidt, Superintendent of the District, in response to Mr. Fronning's request. The purposes of this letter, dated August 20, 2008, were to inform him of Mr. Fronning's request and to ask him to provide information or support for the District's position. On September 8, 2008, IPAD received a response, dated September 4, 2008, from Kristi Hastings, an attorney representing the District.

A summary of the facts as Mr. Fronning provided them is as follows. In April 2008, Mr. Fronning wrote to the District, "As a citizen of the district and member of the public, I request a copy of the...audio recording that was recorded at the public Independent School District #846 board meeting held on September 10, 2007."

Ms. Hastings responded in a letter dated June 2008:

...My understanding of this audio recording is that it was made by Superintendent East with his personal recorder. A request has been made of Mr. East to deliver a copy of this recording to the district. To date, Mr. East has declined to do so. Therefore, the district is not in possession of the data which you seek and cannot provide it to you. You will need to take this matter up directly with Mr. East and his legal counsel...

In his opinion request, Mr. Fronning wrote:

In August 2007, the Interim Superintendent and the Chair has [sic] a discussion about the upcoming teachers [sic] union contract negotiations and the state requirement of data recording of any strategy meetings and the preservation of those recordings. In that discussion the Interim indicated the District did not have a data recorder and that he would look into getting one for the District.

At the September 2007 District Meeting he brought out a data recorder and indicated that he was going to record the next few minutes of the meeting in case there is ever a question in regard to what took place in the meeting and as to what was said. He also reference [sic] it would be available should a copy be requested. He then proceeded to record a portion of the meeting.

Some time after the meeting a copy of the recording was requested. He than [sic] informed the party that the recording was done on his private data recorder and he would not release it to the requested party....

### **Issue:**

Based on Mr. Fronning's opinion request, the Commissioner agreed to address the following issue:

Did School District 846 (Breckenridge) comply with Minnesota Statutes, Chapter 13, in responding to a request for the "audio recording that was recorded at the public [District] board meeting held on September 10, 2007?"

### **Discussion:**

Minnesota Statutes, section 13.02, subdivision 7, defines government data as "all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use."

Thus, any data an entity or its governing board creates, maintains, etc., are government data. One exception to this general rule is if an employee or governing board member creates, maintains, etc., data that are *personal*. That is, data an employee or official did not create in his/her government capacity and data the purpose of which are not related to the operations of government. (Advisory Opinion 05-017.)

Whether government data are public or not public depends upon how the data are classified in Chapter 13, other Minnesota laws, or federal law.

In her comments to the Commissioner, Ms. Hastings wrote:

I represent the Breckenridge School District, No. 846. Board member Bruce Fronning, in his capacity as a member of the public, has requested an advisory opinion...

...In September of 2007, the District's Superintendent was Greg East....

On September 10, 2007, then Superintendent East, was questioned by board member Kathy Radig about a particularly contentious issue. Mr. East stood up, took a recording device out of his pocket and proceeded to leave the stage where school officials sit during meetings and, instead, took a seat in the audience. He then announced his belief that the board was acting unethically. After Mr. East's diatribe, he turned off his recorder, returned to the stage with the Board, and the meeting continued....

[In response to a previous request for the recording, Mr. East] refused stating that the recorder he used at the meeting was his own personal digital recorder and that the recording was done for personal reasons (presumably related to his allegations of future litigation). There can be no dispute that the District does not regularly tape record their board meetings....A request for the recording was made by the District of Mr. East and his attorney, but they refused to provide the District with a copy of the recording. *At no time, up to and including the present time*, has the recording ever come into the possession of the District. The members of the School Board had no advance warning that Mr. East would record a portion of the September meeting. [Emphasis provided.]

...Mr. East is no longer employed by the District...There is no evidence to suggest that the digital tape recording used by Mr. East at the September meeting belonged to the District. It certainly was not left at the District when Mr. East left his position. Mr. Fronning's letter suggests that Mr. East was going to purchase a recorder for the District, but there is nothing in the minutes nor any other written documents or expenditures at the District that would prove the recorder used at the meetings was anything but what Mr. East claimed, his own.

The District did not "collect," "receive," "maintain," nor "disseminate" the tape at issue. It was in the sole possession of a District employee who refused to turn the data over to the public entity.

The Commissioner has the following comments. The fact that Mr. East used his own digital recorder does not, on its face, mean the recording is not government data. (Advisory Opinion 07-006.) There often are situations in which government employees use their own equipment (cars, computers, cell phones, pagers, etc.) for work related purposes. It is not reasonable to conclude that in those situations, related data could not be considered government data.

The most important factor in determining whether the data are government data is if Mr. East was acting in his capacity as the District's superintendent when he made the recording. Although according to Ms. Hastings, Mr. East stated the recording was done for personal reasons, the Commissioner was not presented with any facts suggesting Mr. East made any kind of formal announcement that he was taking off his work hat and putting on his citizen hat. Presumably, if he had done that, his time book should show that he had taken vacation time.

In addition, Ms. Hastings provided a copy of a newspaper article about the September 2007 board meeting. The quotes the reporter attributes to Mr. East make it apparent the Mr. East was acting as the superintendent:

"I am going record what I have to say," he said.

"I have thought long and hard about whether or not I would ever do this," he said. "Certain things have transpired that have left me no choice."

"I am tired of handling you with kids [sic] gloves," East said. "Don't lob surprises at me and don't lay bombs at my doorstep."

For these reasons, the Commissioner concludes that Mr. East was acting as the District's superintendent when he made the recording and, therefore, that the recording is government data. Given that the meeting was open and no one provided arguments as to why the data in the recording are not public, the Commissioner concludes the recording is public government data.

Because the data in the recording are public government data, the District has an obligation to make those data available for members of the public to access. Ms. Hastings states that the District never had possession of the recording and that it attempted to obtain the data from Mr. East. As the Commissioner discussed in Advisory Opinion 95-008:

Each government entity is responsible for assuring that data maintained away from the primary workplace are handled in compliance with Chapter 13. While neither Chapter 13 nor Rules Chapter 1205 provides any specific guidelines for this process, Section 13.05, subdivision 5, does address the issue in an indirect fashion. The language charges the government entity's responsible authority with establishing procedures to assure that all data on individuals are accurate, complete, and current for the purposes for which the data were collected and also with establishing appropriate safeguards for all records containing data on individuals.

The length of time the District is required to keep the recording depends upon whether or not it is an official record. Here, the District is in the best position to make that decision; the Commissioner neither has sufficient information nor knowledge of the issues that gave rise to Mr. East taping a portion of the meeting.

If the data in the recording are an official record, they must be kept for the time specified in the District's retention schedule. If the data in the recording are not official record, the District is not required to maintain them for any specified period of time. (Minnesota Statutes, sections 138.17 and 138.225.) However, regardless of whether the data are official record, if they existed at the time Mr. Fronning made his request, the District should have provided him with a copy. Government entities should adopt procedures or policies that provide for the return of government data from soon-to-be former employees, contractors, or elected officials.

If the data in the recording still exist, the District promptly should provide a copy to Mr. Fronning in response to his request. If the recording no longer exists, the District needs to advise Mr. Fronning that it has no data responsive to his request.

The following note is in order. If the data in the recording still exist, and Mr. East refuses to give the recording to the District, it is not appropriate that Mr. Fronning should bear the cost of going to court to get access to the data. This is the District's responsibility. However, government entities do not seem to have an adequate civil remedy under Chapter 13 to go after former employees and others who refuse to hand over government data. The Commissioner strongly encourages the Legislature to make changes to Minnesota Statutes, section 13.08, so entities are in a better position to seek data from any person over whom the entities no longer have any leverage.

The Commissioner also encourages the District to contact their appropriate prosecuting authority to initiate misdemeanor charges against Mr. East under Minnesota Statutes, section 13.09, should he continue to refuse to produce the data Mr. Fronning requested.

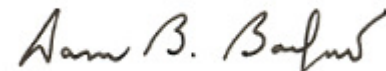
**Opinion:**

Based on the facts and information provided, my opinion on the issue that Mr. Fronning raised is as follows:

The District did not comply with Minnesota Statutes, Chapter 13, in responding to Mr. Fronning's request. Because the superintendent of School District 846 was acting in his official capacity when he recorded a portion of the September 10, 2007, board meeting, the data in the audio recording are government data. The data are classified as public.

If the data existed when Mr. Fronning made his data request, the District should have provided him with a copy. If the data still exist, the District promptly should provide him with a copy. If the data no longer exist, the District promptly should so inform Mr. Fronning. If the data no longer exist and they are an official record, and were destroyed prior to time stated in the District's retention schedule, the District is not in compliance with Minnesota Statutes, section 138.17.

Signed:



Dana B. Badgerow  
Commissioner

Dated:

September 29, 2008